IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5536 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHANTUBEN WD/O PRABHUBHAI KHALASI MOTHER OF DETENU

Versus

COMMISSIONER OF POLICE

Appearance:

MR NM KAPADIA for Petitioner

Mr. S.T. Mehta, ld.A.G.P. for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 10/01/2000

ORAL JUDGEMENT

Heard learned Advocate Mr. N.M. Kapadia for the petitioner and learned A.G.P. Mr. S.T. Mehta for the respondents nos.1, 2 and 3.

1. One Shantuben wd/o Prabhubhai Kalasi has filed the present petition challenging the detention order dated 10-4-1999 passed by the Commissioner of Police, Surat City (the respondent no.1) against the detenu Chandraben w/o Sudhir Lalji in exercise of powers conferred under Section 3(1) of the Gujarat Prevention of Antisocial Activities Act, 1985 (" PASA" for short), under Article 226 of the Constitution of India.

2. The grounds of detention served to the detenu under Section 9(1) of "PASA", copy of which is produced at running page 27 of the compilation inter alia indicate that six Prohibition Cases have been registered against the said detenu-Chandraben at Athwa Lines Police Station between the period from 30th January, 1998 to 11th February, 1999 wherein it is alleged against the detenu that countrymade liquor in different quantities have been seized from the possession of the detenu-Chandraben in each of the case. However, so far as Prohibition Case no.96/99 is concerned, she was arrested on 11-2-1999 and released on bail on 6-4-1999. That in all the other five cases also detenu-Chandraben was released on bail on different dates.

Over and above that two witnesses on assurance of their anonymity have given statements against the prejudicial activity of the detenu vide statement dated 20-2-1999 and 5-3-1999.

3. That in consideration of the aforesaid material the detaining authority has come to the conclusion that the detenu is a " bootlegger " within the meaning of Section 2(b) of "PASA". That enforcement of general provisions of law being insufficient to prevent the detenu from continuing her prejudicial activities, and thereby in order to prevent the detenu from continuing her such activities, the impugned order has been passed.

4. The detenu has challenged the impugned order on numerous grounds. It has been contended at the Bar that the impugned order discloses non application of mind. It is pointed out on behalf of the detenu that though the detenu was arrested on 11-2-1999 in Prohibition Case registered against her at Athwa Lines Police Station vide CR no.96/99 and has remained in police custody till she was released on bail on 6-4-1999, the detaining authority has recorded that witness no.2 has given a statement in respect to incident dated 5-3-1999 whereby the detenu is alleged to have gone to the house of witness in the company of co-accused with twenty cans of countrymade liquor and has asked the witness to keep the said liquor

in his house. The witness having denied was dragged out from his house, brought on the road and severely beaten. It is submitted on behalf of the detenu that if the detenu has been in judicial custody from 11-2-1999 to 6-4-1999 till she was released on bail, the statement given before the police authority and verified by the detaining authority cannot be an authenticated statement. The detaining authority having these facts before him seems to have verified the statement without proper application of mind. Such non application of mind has vitiated the impugned order.

5. No affidavit has been filed on behalf of either of the respondents. The learned A.G.P. and the officer present to assist him could not explain the discrepancy of date as stated in the impugned order regarding statement of anonymous witness dated 5-3-1999, and as such, the facts have remained uncontroverted, discloses non application of mind on the part of the detaining authority.

6. The next contention urged on behalf of the detenu is added by way of amended paragraph 29 (D) to contend that before passing the impugned order, the detaining authority has failed to consider the aspect of less drastic remedy of opposing and/or claiming cancellation of bail available under Section 437(5) of the Cr.P.C.

7. That in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT reported in 1995(2) G.L.R. 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Sec.437(5) of the Cr.P.C. to claim cancellation of bail amounts to non application of mind which vitiates the subjective satisfaction rendering the detention order bad in law.

8. In the instant case also, the respondents are not in a position to explain why the aspect of less drastic remedy has not been considered by the detaining authority. The impugned order is totally silent on this aspect, and as such, I am constrained to hold that the impugned order is invalid and bad in law.

9. As the petition succeeds on the aforesaid grounds, it is not necessary to consider and decide, the other contentions raised in the petition.

10. On the basis of the aforesaid discussion, the petition is allowed. The order of detention dated 10-4-1999 passed by the respondent no.1-Commissioner of

Police, Surat City, against the detenu is hereby quashed and set aside. The detenu-detenu-Chandraben w/o. Sudhir Lalji is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute to that extent.

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